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CHARLES ELMORE CRO

Supreme Court of the United States

OCTOBER TERM, 1951.

No. [redacted] 88

SAMUEL C. BRODY,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF SUFFOLK, MASSACHUSETTS, AND BRIEF IN SUPPORT THEREOF.

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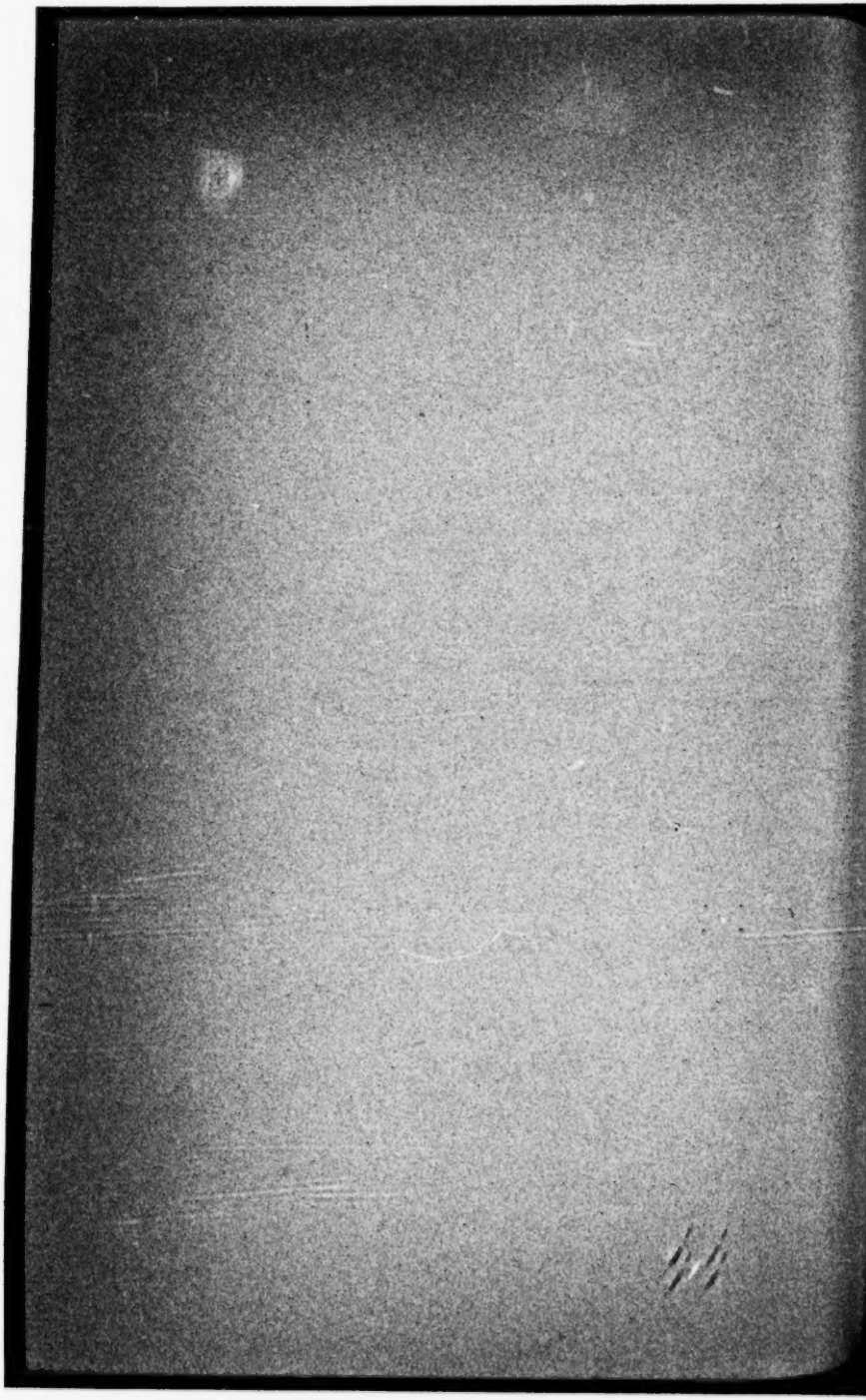

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Supreme Court of the United States.

OCTOBER TERM, 1951.

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COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF SUFFOLK, MASSACHUSETTS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respectfully represents Samuel C. Brody, the petitioner, that he is now confined in the State Prison in the Charlestown District of Boston, Massachusetts, serving the sentence of three to five years imposed by the Superior Court in and for the County of Suffolk, Massachusetts, in case numbered 22 on its criminal docket for the year 1952, to be followed by a similar sentence imposed upon him by said court in case numbered 23 of 1952, each case being entitled *Commonwealth of Massachusetts* v. *Samuel C. Brody* (said cases were formerly numbered 41 and 42 of 1951); that in each of said cases he duly filed *a petition to vacate sentence, withdraw his plea of guilty and obtain a*

trial on the merits; that said Superior Court refused to hear any evidence in support of either petition and denied it as matter of law, to which denials the petitioner duly excepted; and that in each case the denial and his conviction were in effect affirmed upon review by the Supreme Judicial Court of Massachusetts by overruling the petitioner's exceptions.

The petitioner respectfully prays that a writ of certiorari issue, directed to the said Superior Court, commanding it to certify and send to this Court for its review and determination, on a day certain, a full and complete transcript of the record and all proceedings in said cases and the rescripts of said Supreme Judicial Court overruling the petitioner's exceptions and in effect affirming said judgments (all of which are set forth in the record filed with this petition); and that the judgments of said Superior Court be reversed or ordered vacated; that he be permitted to enter pleas of not guilty and be given trials on the merits of the charges made against him; and that he may have such other and further relief in the premises as may seem meet and just.

Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts that "There was no lack of due process" is reported in Massachusetts Advance Sheets for 1952, page 361, and appears in the record filed with this petition.

Statement of the Matter Involved.

The petitioner was indicted in *July, 1949,* in seven (7) indictments containing sixty-five (65) counts of grand larceny from Sears Roebuck and Co., was arraigned on *July 12, 1949,* and pleaded not guilty to each indictment.

In *May, 1950,* the Massachusetts Department of Mental Health "wrote the petitioner for examination *but he did not report.*"

On *June 2, 1950,* at the instance of his counsel, the petitioner was examined by a psychiatrist and mental expert who made a written report concerning the petitioner's mental condition and delivered it to said counsel. Two other mental experts confirmed the conclusion that—

> "Samuel Brody is in an extremely disordered mental state. His thinking is delusional. His mental state serious and ominous. He is potential grave suicidal risk. There is cessation of responsibility. Reality is almost meaningless to him. . . .
>
> "This depressed individual with strong overt paranoid features has neither the stamina nor the mental resources for undergoing any further trial. He is ill equipped to assume such responsibility. The situation demands prudence, foresight and wholesome restraint. This man's mental health, yes, his very life is in the balance. His mental state is chaotic and he presently lacks the capacity to adjust in a non-commitment setting. In short, it is imperative and urgent that he be removed to a mental institution for treatment. This would forestall further mental collapse, and also would safe-guard him and society."

On *June 5, 1950,* the petitioner, although innocent and insane, pleaded guilty before Mr. Justice Buttrick, who was not informed of said report concerning the petitioner's mental state, who did not ascertain whether the petitioner had sufficient mental capacity to understand the nature and effect of his plea of guilty and who did not admonish or explain what might be its consequences and penalties. The cases were continued for disposition with-

out a hearing or trial on the merits and the petitioner was deprived of the opportunity of presenting his defenses.

On *October 9, 1950,* the petitioner, while innocent and insane, and without any objection made in his behalf, was sentenced by Chief Justice Higgins on said indictments now numbered 22 and 23. Later, while still innocent and insane, the Appellate Division reviewed and dismissed his appeal from said sentences.

The petitioner was never examined in accordance with Massachusetts General Laws (Ter. Ed.) c. 123, § 100A (as amended by St. 1941, c. 194, § 11), which provides:

> ". . . whenever a person, who is . . . indicted for any . . . offense more than once . . . is indicted . . . the clerk of the court in which the indictment is returned . . . shall give notice to the department [of mental health], which shall cause such person to be examined . . . to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. . . . The department shall file a report of its investigation with the clerk of the court in which the trial is to be held, and the report shall be accessible to the court, the probation officer thereof, the district attorney and to the attorney for the accused. . . ."

The petitioner did not intelligently understand nor was he advised concerning his rights. He was compelled either to waive trial or to go to trial without his defense being sufficiently prepared. When he pleaded guilty, when he was sentenced, when he appealed to the Appellate Division, and when he appeared before it—

> "he was mentally unsound and unable to understand, appreciate and comprehend his position, the nature of the indictments and the proceedings thereon; he

was incapable of protecting his own interests, of consulting intelligently with his counsel and assisting in the preparation and presentation of his defense and other material matters." (Tr. of Record, pp. 3 and 4.)

On *September 21, 1951,* in each of the cases now numbered 22 and 23, the petitioner duly filed *a petition to vacate sentence, withdraw his plea of guilty and obtain a trial on the merits,* setting forth the facts above recited. At the time set for hearing said petitions, the petitioner offered testimony of several witnesses to support his allegations on the question of mental capacity. The Commonwealth objected to the taking of any testimony, and the Chief Justice refused to hear any evidence and denied the petitions *as matter of law,* to all of which the petitioner duly excepted.

Statutes Involved.

The statutes involved are Massachusetts General Laws (Ter. Ed.) c. 123, § 100A, requiring a mental examination of a person who is indicted for felony more than once; and Massachusetts General Laws (Ter. Ed.) c. 278, § 29, as amended by St. 1939, c. 271, which empowers the Superior Court within one year after an indictment is tried, upon written motion of the defendant, to "grant a new trial for any cause for which by law a new trial may be granted, or if it appears to the court that justice has not been and cannot be done, and upon such terms or conditions as the court shall order."

Jurisdiction.

On *April 1, 1952,* the Supreme Judicial Court rendered the decision that "There was no lack of due process" and issued rescripts to the Superior Court overruling the peti-

tioner's exceptions and in effect affirming the judgments in cases numbered 22 and 23.

The jurisdiction of this Court is sought to be invoked under Title 28 U.S.C. § 1257(3), and the Fourteenth Amendment to the Constitution of the United States, because the petitioner has been denied due process of law in that—

1. He was not afforded a trial on the merits of the indictments returned against him.

2. The judgments entered in these cases were based solely upon his judicial confessions—pleas of guilty—made involuntarily, unintelligently and without his free will, at a time when he was mentally incapable of understanding their nature, purport and consequences.

3. The Superior Court accepted his pleas of guilty without attempting to ascertain whether he had the mental capacity so to plead, and whether he did so voluntarily, intelligently and without physical or mental coercion.

4. He was deprived of a judicial review by the Superior Court of its own lack of jurisdiction to accept the pleas of guilty and to impose the sentences while he was insane.

5. He was deprived of the benefit of the exercise of the inherent power of the Superior Court to vacate the sentences which it imposed when it was without power to sentence him because of his mental incapacity.

6. The petitioner was denied and deprived of an adequate hearing in the Superior Court on his petition to vacate sentence, withdraw his plea of guilty and obtain a trial on the merits in cases numbered 22 and 23.

7. He was deprived of a judicial review or other adequate remedy to determine whether his convictions were obtained in violation of his rights under the Fourteenth Amendment to the United States Constitution by the use of pleas of guilty—judicial confessions of guilt—made while he was insane, because Massachusetts does not provide such review or remedy.

Jennings v. *Illinois*, 342 U.S. 104.

8. He has exhausted all substantial judicial remedies afforded him by Massachusetts.

Questions Presented.

1. Did the Superior Court, upon the indictments charging the petitioner with the serious felonies of grand larcenies, have the power to accept his guilty pleas while he was insane?

2. Did the Superior Court deprive the petitioner of due process by accepting his guilty pleas to the alleged felonies while he was insane and incapable of comprehending their nature, purport and consequences?

3. Was there a lack of due process by the Superior Court in accepting the petitioner's guilty pleas without ascertaining whether he was sufficiently sane to understand their nature, purport and consequences?

4. As a prerequisite to the acceptance of his guilty pleas, was the petitioner entitled to have the trial judge ascertain whether he was mentally capable of pleading guilty—making judicial confessions?

5. In view of its enactment of General Laws (Ter. Ed.) c. 123, § 100A, was the Commonwealth of Massachusetts required as due process of law to cause a mental examination of the petitioner before accepting his pleas of guilty?

6. Was the failure of his counsel to apprise the court of his insanity imputed to the petitioner so as to foreclose his right to maintain his said petitions to vacate sentence, withdraw his guilty plea and obtain a trial on the merits?

Commonwealth v. *Corrie*, 302 Pa. 431, 437.

7. As a prerequisite to the imposition of sentence, was the petitioner entitled to have the court ascertain whether he was insane?

8. Could the petitioner be legally sentenced to a penal institution while he was insane?

Nobles v. *Georgia*, 168 U.S. 398.

9. Could the Superior Court refuse to review its action and to determine whether the petitioner was insane at the time it accepted his guilty pleas and imposed sentences?

10. Could Massachusetts properly refuse to review through its judicial department whether the petitioner was insane at the time he pleaded guilty and at the time he was sentenced?

11. Is the right to apply for executive clemency a sufficient substitute for the right to judicial review so as to constitute due process of law?

Specification of Errors.

The Superior Court of Massachusetts denied due process of law to the petitioner by—

1. Accepting his guilty pleas while he was insane.

2. Relying solely upon the presumption that the petitioner was sane and failing to ascertain whether in fact he was of sound mind and understood the nature, purport and consequences of his pleas.

3. Failing to enforce the provisions of Massachusetts General Laws (Ter. Ed.) c. 123, § 100A, requiring a mental examination of the petitioner.

4. Basing its convictions solely upon the guilty pleas of the petitioner while he was insane.

5. Sentencing the petitioner to a penal institution without ascertaining whether he was of sound mind at the time.

6. Failing to have the petitioner sentenced by the judge upon whose mercy he put himself—the one before whom he pleaded guilty.

7. Failing to allow the petitions to vacate sentences, withdraw his guilty pleas and obtain a trial on the merits.

8. Failing to afford the petitioner the opportunity to establish the truth of the allegations of his petitions to vacate sentences, withdraw his guilty pleas and obtain a trial on the merits.

9. Denying his petitions as matter of law and ruling that it had no power to vacate the sentences, permit him to withdraw his guilty pleas and afford him the opportunity of a trial on the merits, even though the pleas were made and sentences imposed while he was insane.

The Supreme Judicial Court of Massachusetts erred—

10. In its conclusion that "There was no lack of due process."

11. In deciding that the convictions of the petitioner could be based solely upon his guilty pleas made while he was insane.

12. In ruling that, in accepting the petitioner's pleas of guilty, the judge could rely solely upon the presumption that the petitioner was sane and was under no duty to ascertain whether the petitioner understood the nature, purport and consequences of his pleas.

13. In ruling that the petitioner "throughout the prosecution had the benefit of experienced and skilful counsel" even though "His counsel did not inform the judge of the psychiatrist's report" and permitted him to enter guilty pleas and be sentenced while innocent and insane.

14. In ruling that the petitioner could be sentenced by a judge other than the one upon whose mercy he put himself—the one before whom he pleaded guilty.

15. In ruling that sentences of punishment to a penal institution were properly imposed upon the petitioner while he was insane.

16. In ruling that the petitioner was "notified" and "refused" to submit to a mental examination under Massachusetts General Laws (Ter. Ed.) c. 123, § 100A, when the record merely indicates that "in May 1950, the Mental Department was notified, wrote the petitioner and he did not report." The record does not disclose what the Mental Department wrote, whether it was sent to the petitioner or whether he received it. Further, this was presumably at a time when he was insane and incapable of comprehending the meaning of any communication. An insane man cannot know of his rights.

People v. *Shroyer*, 336 Ill. 324.

17. In ruling that the Superior Court, as well as the judicial department of the Commonwealth, "was without jurisdiction" to vacate the sentences, to permit the petitioner to withdraw his pleas of guilty and to permit him to have a trial on the merits of the charges made in the indictments.

18. In ruling that the Superior Court properly refused to hear evidence in support of his petitions "to vacate sentence, withdraw plea of guilty and obtain trial on the merits," and correctly denied the petitions "as matter of law."

19. In denying to the petitioner an adequate review of the circumstances in which he pleaded guilty and was sentenced.

Jennings v. *Illinois,* 342 U.S. 104, 112.

20. In ruling that a trial on the merits of the charges made in the indictments cannot be given to the petitioner, because he pleaded guilty, even though he did so while insane and without the actual benefit of counsel.

21. In denying to the petitioner an appropriate remedy to assert that his constitutional right of due process was infringed.

Jennings v. *Illinois,* 342 U.S. 104.
Mooney v. *Holohan,* 294 U.S. 103, 113.

22. In delegating to the executive department of the Commonwealth review of the action of the Superior Court and the Supreme Judicial Court.

23. In ruling that the petitioner's sole remedy in the instant cases is by "appeal for clemency to the Governor."

Reasons for Granting the Writ and Brief in Support Thereof.

The petitioner respectfully contends that the writ of certiorari should be granted to review and reverse the judgments of the Superior Court because he has been DENIED VITAL FUNDAMENTAL RIGHTS GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

1. "His day in court"—a right to a trial on the merits of the charges made against him.

Hawk v. *Olson,* 326 U.S. 271.
Wilson v. *S.,* 222 Ind. 63.

2. Fair and just procedural treatment by—

a. Being convicted solely upon his judicial confessions of guilt made while he was insane.

b. Being sentenced to penal servitude while he was insane.

c. Not having real effective assistance of counsel.

d. Not being examined as to his mental condition under Massachusetts General Laws, c. 123, § 100A.

e. The court's failure to ascertain whether he had sufficient intelligence to comprehend that he was making judicial confessions of guilt.

f. The court's failure to ascertain whether he had sufficient intelligence to comprehend that he was being sentenced.

g. The court's improper use of a presumption that the petitioner was sane.

h. Being sentenced by a judge other than the one before whom he pleaded guilty.

The due process clause requires that state action be consistent with fundamental principles of liberty and justice; that there be decency and fair play.

Hebert v. *Louisiana,* 272 U.S. 312.

The use of an extra-judicial confession is prohibited unless made in the exercise of free will.

> "The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess to or deny a suspected participation in a crime."

Lyons v. *Oklahoma,* 322 U.S. 596, 602.

For stronger reason, a judicial confession should not be the basis of a confession unless there is freedom of will.

> "It is fundamental that an insane person can neither plead to an arraignment, be subjected to trial, or after trial, receive judgment, or, after judgment, undergo punishment."
>
> *Youtsey* v. *United States* (6th Cir.), 97 F. 937, 940.

> ". . . if the appellant was insane at the time he was tried, he could not have legally . . . pleaded guilty to the indictment for the reason that he was incapable of making a proper defense."
>
> *Forthoffer* v. *Swope* (9th Cir.), 103 F. (2d) 707.
> 10 A.L.R. 213-217.
> Smoot, Law of Insanity, §§ 452-453, p. 377.

4 Bl. Com. 24, 25:

> "Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he lose his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed; for peradventure, says humanity of the English law, had the prisoner been of sound memory he

might have alleged something in stay of judgment or execution."

Fralick v. *State,* 25 Ariz. 4.
State v. *Fabisinski,* 111 Fla. 454.
People v. *Maynard,* 347 Ill. 422.
People v. *Preston,* 345 Ill. 11.
Howie v. *State,* 121 Miss. 197.
In re Smith, 25 N.M. 48.
Freeman v. *People,* 4 Denio (N.Y.) 9.
39 A.L.R. 83.

In *Sanders* v. *Allen,* 100 F. (2d) 717, where the appellant sought habeas corpus upon the allegation that "at the time of her trial [she] was mentally incapable of understanding the nature of the charge against her or of defending herself . . . at the time of her arrest and trial she was wholly under the influence of a drug administered to her without her knowledge and consent and that, in consequence, she did not know what was going on in the courtroom when she was tried and convicted, and that this condition of mental incompetency continued . . ." the court said, at pages 719-720:

"If this allegation is true, law and justice require that the conviction be set aside and that she be discharged. . . .

"The trial and conviction of a person mentally and physically incapable of making a defense violates certain immutable principles of justice which inhere in the very idea of free government."

Powell v. *Alabama,* 287 U.S. 45, 71.
84 A.L.R. 527.

"It is, of course, true, . . . that an insane person cannot plead nor can he be sentenced. Violation of that rule would without doubt raise the federal question of violation of the due process requirements of our federal constitution."

United States, ex rel. Mazy, v. *Ragen* (7th Cir.), 149 F. (2d) 948, 950.
Jablowski v. *People,* 330 Ill. App. 430.
Deegans v. *Commonwealth,* 228 Ky. 664.
Jordan v. *State,* 124 Tenn. 81.

The true reason why an insane person should not be tried is that he is disabled by an act of God to make a just defense if he has one.

Commonwealth v. *Leeds,* 32 Del. Co. (Pa.) 418.

Accepting a guilty plea and sentencing an innocent man while he is insane is so offensive to the fundamental principles of liberty and justice that it violates due process.

Phyle v. *Duffy,* 334 U.S. 431, 439.

The Superior Court lost its power to proceed against the petitioner while he was insane. His right to understand and comprehend what was going on in his felony cases existed at every stage of the proceedings.

Presumption of petitioner's sanity. The Supreme Judicial Court of Massachusetts decided that the petitioner's pleas of guilty to seven serious felonies were properly accepted by the Superior Court without determining whether the petitioner knew what he was doing; that the judge was under no duty to ascertain whether the petitioner comprehended the effect of his conduct because the

judge could rely solely upon a presumption of fact that the petitioner was sane and was acting rationally. In other words, the judge's task was so simplified by his use of the presumption that he could supinely sit back and accept whatever was presented to him without making his own determination of the proper course of conduct or without deciding whether, because the accused was surrendering vital rights, he required certain judicial protection. With the same reasoning a judge could deprive an ignorant, unintelligent or weak-minded defendant of his rights by using a presumption that he was of normal intellect, had sufficient understanding to know his rights and that, by not insisting upon them, he intelligently waived them.

A judge in a criminal case, before whom a person accused of serious felonies makes a judicial confession of guilt, should be alert to examine for himself and determine the fact whether the accused is acting intelligently and understandingly.

Johnson v. *Zerbst,* 304 U.S. 458, 467.
Chapman v. *State,* 136 Tex. Cr. 285.

This is particularly so in Massachusetts, where it was said in *Commonwealth* v. *Devereaux,* 257 Mass. 391, 396:

> "The examination is required [by G.L. (Ter. Ed.) c. 123, § 100A] in order that no person so indicted may be put upon his trial unless his mental condition is thereby determined to be such as to render him responsible to trial and punishment for the crime charged against him, and that he has no mental disease or defect which interferes with such criminal responsibility."

Before permitting the entry of a plea of guilty he has a duty to advise the accused fully.

State v. *Jameson,* 71 S.D. 144.

The mere fact that the petitioner pleaded guilty furnished no basis for the presumption that he was sane at the time he did it. Such a presumption, in the instant case, was unreasonable, arbitrary and violated due process—

Western & Atlantic Railroad v. *Henderson*, 279 U.S. 639;

especially since there was no proof of any fact to create the presumption of sanity, understanding or comprehension. In other words, because the petitioner pleaded guilty, it was presumed that he was sane and that he knew what he was doing.

United States v. *Delia*, 318 U.S. 748.

In criminal cases the burden of evidence and the burden of persuasion are upon the government to establish the guilt of the accused. When he confesses guilt, whether in open court or outside, the government has the burden of proving that the confession was freely made. When, as here, an accused confesses his guilt in open court, should there be some affirmative proof of the voluntary character of his conduct? In the instant case the Superior Court went so far as to transfer to the petitioner by means of a presumption the initial burden of producing evidence at the very time he pleaded guilty that he did not comprehend what he was doing. This imposed upon him the duty to produce exculpatory evidence at the very outset.

Dissenting opinion of Roberts, J., in *United States* v. *Delia*, 318 U.S. 748.

Assistance of counsel. To meet the requirements of due process, assistance of counsel must be effective.

Powell v. *Alabama*, 287 U.S. 45.

The conduct of defense counsel should be zealous and active, not merely *pro forma*. Neglect of counsel may be so great as to deprive the accused of his day in court.

Hawk v. *Olson*, 326 U.S. 271.
149 A.L.R. 1403.

3. An adequate judicial review by the Superior Court to ascertain whether it had jurisdiction of the petitioner when he pleaded guilty, was convicted and was sentenced; an effective review by the Supreme Judicial Court of the convictions and sentences imposed upon the petitioner; and the purported delegation to the executive department of the sole power of such review.

Every court has inherent power, without or despite statutes, to vacate its own void or improperly rendered judgments, to correct that which it was not authorized to do.

Whitman v. *Wilson*, 318 U.S. 688.
Morhous v. *New York Supreme Court*, 293 N.Y. 131, 134.
Lyons v. *Goldstein*, 290 N.Y. 19, 25.

Roberts v. *State*, 160 N.Y. 217, 221, 222:

"If the judgment was erroneous, the remedy was . . . by application to set it aside, and not by pardon. That question was for the judicial branch of the state government to determine and not for the legislative or executive departments."

Lyons v. *Goldstein*, 290 N.Y. 19, 27:

"The record here discloses that Bendix or someone in his behalf had made a number of applications . . . for executive clemency. On two occasions the District

> Attorney . . . joined in the application and one of the applications was initiated by the judge who pronounced sentence. In spite of all that all applications have been denied. Nevertheless, executive clemency presents no such relief as Bendix desires and as he is entitled to receive, if he can, upon a hearing, establish grounds for the invalidity and nullity of the judgment of conviction. Executive clemency does not eliminate the fact of conviction; it merely results in ending further punishment."

It is a violation of due process to keep one in prison under a void judgment. A conviction is based on a void sentence when imposed upon an ineffectual guilty plea.

146 A.L.R. 1430.
66 A.L.R. 628.
20 A.L.R. 1445.

A person in custody pursuant to a void judgment is improperly deprived of his liberty and should be released.

Allen v. *State*, 102 F. Supp. 866, 869.

A sentence which was not within the power of the court to impose is unlawful.

In re Mills, 135 U.S. 263.
Nielsen, Petitioner, 131 U.S. 176.

Article XXX of the Massachusetts Constitution provides for a complete separation of the executive and judicial departments: "In the government of this commonwealth . . . the executive shall never exercise . . . judicial powers . . . to the end that it may be a government of laws and not of men." This separation has been

rigidly enforced. Not even the judicial department can abdicate any of its duties and place the responsibility of performance on another department.

Opinion of Justices, 315 Mass. 761, 768.
Dinan v. *Swig,* 223 Mass. 516, 519.
Case of Supervisors of Election, 114 Mass. 247, 251.

4. His right to an adequate remedy for review of the judgments imposed by a court which lacked jurisdiction over him because of his insanity.

In Massachusetts, "After sentence has been pronounced three methods of relief alone are open to a defendant in a criminal case: (1) motion for a new trial under the statute [G.L. (Ter. Ed.) c. 278, § 29], (2) writ of error, (3) appeal for clemency to the Governor."

Commonwealth v. *Phelan,* 271 Mass. 21, 22.
Commonwealth v. *Dascalakis,* 246 Mass. 12, 20.
Commonwealth v. *Soderquist,* 183 Mass. 199, 200, 201.

Method (1) is eliminated from this case by the decision of the Supreme Judicial Court that "a motion for new trial does not lie where there has been sentence on a plea of guilty without trial."

Commonwealth v. *Brody* (instant case), 1952 Mass. Adv. Sh. 361.

Method (2) is of no avail, because in Massachusetts "A judgment must be erroneous on the face of the record in order to be reversible on writ of error; it is deemed to be good unless error is thus shown."

Harding v. *Commonwealth,* 283 Mass. 369, 371.

Here, the record does not disclose the petitioner's insanity, the conduct of the judges of the Superior Court, the conduct of counsel, and most of the essential facts set out in the petitions to vacate sentences.

While a petition to vacate sentence is deemed to be in the nature of an application for a writ *coram nobis* and is governed by the general principle applicable to *habeas corpus*—

Yodock v. *United States*, 97 F. Supp. 307, 308—

in Massachusetts "the writ of error *coram nobis* has . . . become obsolete in view of the express purpose of the legislature as manifested by the statute [G.L. (Ter. Ed.) c. 250, § 11, which applies only to a capital case]."

Commonwealth v. *Sacco*, 261 Mass. 12, 17.

The instant petitions to vacate sentences carried to the Massachusetts Supreme Judicial Court the entire record of the proceedings in the Superior Court and had all the effect of writs of error.

Method (3) does not afford the petitioner an adequate remedy. In Massachusetts the pardoning power appears in General Laws (Ter. Ed.) c. 127, § 152. It affords the petitioner no remedy as matter of right. Executive clemency is an act of grace; it is entirely discretionary and may be encumbered with many onerous conditions. It can be granted only by and with the advice of the nine members of the Governor's Council.

United States v. *Wilson*, 7 Pet. 150.
Juggins v. *Executive Council*, 257 Mass. 386, 388, 389.
Opinion of Justices, 210 Mass. 609.
Opinion of Justices, 190 Mass. 616.

Lyons v. *Goldstein*, 290 N.Y. 19 (similar to case at bar).

In fine, Massachusetts by its failure to provide this petitioner with judicial remedy or a right to executive remedy has deprived him of due process.

Conclusion.

Wherefore it is respectfully submitted that the petition should be granted.

SAMUEL C. BRODY,
By his Attorneys,
EDWARD M. DANGEL,
LEO E. SHERRY,
CHARLES J. AUSTIN.

JUN 28 1952
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 88.

SAMUEL C. BRODY,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SAMUEL C. BRODY,
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COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Case.

This is a petition for a writ of certiorari to review and reverse judgments of the Superior Court of Massachusetts in denying two petitions to vacate sentences, withdraw pleas of guilty and obtain trial on the merits after pleas of guilty and sentences upon said pleas, which petitions were presented to the Superior Court long after the pleas of guilty had been entered by the defendant, the present petitioner, and long after the sentences had gone into execution and long after the sitting of the court, at which said sentences had been imposed, had ended.

Jurisdiction.

The jurisdiction of this court is now invoked under Title 28, U.S.C. § 1257 (3).

Report of Opinion.

The opinion of the Supreme Judicial Court, the court of highest appellate jurisdiction in the Commonwealth of Massachusetts, rendered April 1, 1952, is reported in Massachusetts Advance Sheets for the year 1952, at page 361. This opinion of the Supreme Judicial Court in the premises reads as follows:

> "WILLIAMS, J. These are two petitions identical in form and content by the defendant, who is serving a sentence in the State prison, to 'vacate [his] sentence, withdraw [his] plea of guilty and obtain trial on the merits.'
>
> "The petitions and the record disclose the following facts. Seven indictments containing sixty-five counts for larceny were returned against the defendant by the grand jury of Suffolk County on July 8, 1949. He was arraigned on July 12, 1949, pleaded not guilty, and was admitted to bail. In May, 1950, he was notified by the department of mental health to report for a mental examination under the provisions of G. L. (Ter. Ed.) c. 123, § 100A. He did not report. On May 25 and June 2 at the instance of his counsel he was examined by a psychiatrist, whose report to counsel is annexed to the petitions. The report stated in substance that the defendant had a 'psychosis,' was 'in an extremely disordered mental state,' and required treatment in a mental institution. On June 5, 1950, the defendant pleaded guilty to the seven indictments before a judge of the Superior Court. His counsel did not inform the judge of the psychiatrist's report. The indictments were continued for disposition and on October 9, 1950, were brought forward before another judge of the Superior Court on motion for sentence. No objection was made to the imposi-

tion of sentence by a judge other than the one who had received the pleas of guilty nor was reference made by counsel to the psychiatrist's report. On indictment numbered 41 the defendant was sentenced to a term of from three to five years in the State prison and on indictment numbered 42 to a like term to be served from and after the expiration of the first sentence. The other indictments were placed on file. Execution of the first sentence began immediately. On October 13, 1950, the defendant filed appeals to the Appellate Division of the Superior Court under G. L. (Ter. Ed.) c. 278, §§ 28A-28D, inserted by St. 1943, c. 558, § 1, and amended, which appeals, after a hearing at which the defendant was personally present, were (on November 30, 1950) dismissed. The present petitions were filed on September 21, 1951.

"The defendant alleges that, at the times he pleaded guilty, was sentenced, and appeared before the Appellate Division, he was mentally unsound, unable to understand his position, and incapable of consulting intelligently with counsel; that he was 'rushed into trial'; and that his constitutional rights were violated by the imposition of sentence by a judge other than the one before whom he pleaded guilty. The judge before whom the petitions came for hearing refused to hear testimony as to the defendant's mental capacity and denied each petition 'as a matter of law.' The defendant's exceptions are to this refusal to hear testimony and to the denials of the petitions.

"We think the defendant has no just cause of complaint in respect to the proceedings which resulted in the imposition of the sentences. These proceedings were in accordance with the established procedure of our courts and afforded the defendant full opportu-

nity to present any defence which he may have had. There was no lack of due process. See *Commonwealth* v. *Coggins,* 324 Mass. 552, 556-557.

"He was not 'rushed into trial' and throughout the prosecution had the benefit of experienced and skilful counsel. Although he now contends that the court should have ascertained his mental condition before accepting his pleas and imposing sentence, he refused a mental examination by the department whose duty it was to determine that condition and failed to disclose to the court the report of his own psychiatrist on which he now relies. In the absence of evidence to the contrary the judge could rely on the presumption that the defendant was sane. *Commonwealth* v. *Heath,* 11 Gray, 303, 304. *Commonwealth* v. *Belenski,* 276 Mass. 35, 45. While the defendant was not required to submit to a mental examination his refusal did not prevent the Commonwealth from putting him on trial. *Commonwealth* v. *Gray,* 314 Mass. 96, 104-105. See *Commonwealth* v. *Vallarelli,* 273 Mass. 240, 249; *Commonwealth* v. *Belenski,* 276 Mass. 35, 43. He made no objection to sentence by a judge other than the one before whom he had pleaded. The authority of this judge to impose sentence cannot be doubted. See *Commonwealth* v. *Gedzium,* 261 Mass. 299; *Peterson* v. *Hopson,* 306 Mass. 597, 603.

"But apart from the merits of the defendant's contentions we think the Superior Court was without jurisdiction to act upon the petitions. The point involved was decided in *Commonwealth* v. *Phelan,* 271 Mass. 21. In that case and in *Commonwealth* v. *Soderquest,* 183 Mass. 199, the methods of relief from a final judgment in a criminal case are clearly stated. If these petitions be treated as motions for new trial,

they were denied rightly because a motion for a new trial does not lie where there has been sentence on a plea of guilty without trial. After the decision in the *Phelan* case, G. L. (Ter. Ed.) c. 278, § 29, which provided for the granting of new trials in criminal cases, was amended by St. 1939, c. 271, § 1, by adding to the provision that a new trial may be granted if it 'appears to the court that justice has not been done' a further provision for a new trial if it appears to the court that justice 'cannot be' done. As this amending clause only states an additional cause for a new trial, it has no application to a case in which there has been no trial.

"The petitions could not be considered as motions for modification of sentence because not filed before the end of the October sitting when they were imposed. *Commonwealth* v. *Phelan,* 271 Mass. 21, 22. *Commonwealth* v. *Soderquest,* 183 Mass. 199, 200-201. See also *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 20; *Fine* v. *Commonwealth,* 312 Mass. 252, 256-257. The petitions were properly denied. It necessarily follows that there was no error in refusing to take testimony.

Exceptions overruled."

Statement of Certain Material Facts.

During the July, 1949, sitting of the Superior Court for criminal business held at Boston, seven indictments were returned in said court against the defendant, Samuel C. Brody, the petitioner in the present proceedings for certiorari. These indictments charged the defendant with the crime of larceny in a total of sixty-five counts, committed on various dates, of moneys of the property of

Sears, Roebuck & Co., each of said larcenies in said counts being felonies (R. 9).

On July 12, 1949, the defendant Brody was arraigned in the Superior Court and pleaded not guilty to each indictment (R. 9).

In May, 1950, the Department of Mental Health for the Commonwealth was notified and, pursuant to the provisions of General Laws (Ter. Ed.) c. 123, § 100A, the defendant Brody was requested to report for mental examination before impartial psychiatrists selected by the Department of Public Health of the Commonwealth (R. 9). The defendant Brody did not report for this examination (R. 15).

On June 5, 1950, the defendant pleaded guilty to all seven indictments before Mr. Justice Buttrick of the Superior Court, who was at that time sitting. At the time he pleaded guilty the defendant was represented by counsel, experienced and skilful. The case was continued for disposition. There was no objection by the defense to the continuing of the case for disposition.

On October 9, 1950, the defendant was sentenced by Mr. Chief Justice Higgins of the Superior Court on two of the indictments on which pleas of guilty had been entered. Five of the indictments were placed on file at the time of sentence on the other two. At the time of sentence and disposition of the indictments the defendant was represented by counsel. The defendant was notified of his right to appeal to the Appellate Division (R. 9).

On the two indictments upon which sentence was imposed by Chief Justice Higgins on October 9, 1950, the defendant on one indictment was sentenced to serve a term of from three to five years in the State Prison and on the other indictment was sentenced to serve a term of from three to five years in State Prison, the sentence on the second indictment to be served on and after the sentence

on the first. The execution of the sentences was immediately begun and the defendant is now serving his sentence on the first indictment.

On October 13, 1950, the defendant filed request for leave to appeal to the Appellate Division of the Superior Court. Leave was allowed and defendant filed appeal.

On November 30, 1950, the defendant was brought on process from the State Prison before the Appellate Division of the Superior Court for hearing on his appeal. Justices Collins, Brogna and Sullivan of the Superior Court were present and sitting on the Appellate Division. At the hearing before these justices the defendant Brody was present and represented by counsel. The Commonwealth was represented by Frederick T. Doyle, Assistant District Attorney. After hearing, the order of the Appellate Division was "Appeal dismissed."

On September 26, 1951, the defendant by his attorney filed in the Superior Court petitions to "vacate sentence," "withdraw plea of guilty," and "obtain trial on merits" (R. 10). The petitions were identical and alleged that the defendant was innocent, but pleaded guilty; that he did not have sufficient mental capacity to understand the nature and effect of his plea of guilty; that his defense was not properly prepared; that being sentenced by any judge other than Justice Buttrick, before whom he pleaded guilty, was a violation of the defendant's rights as was the failure to be examined by the Department of Mental Health (R. 15, 16, 17).

On September 26, 1951, Chief Justice Higgins of the Superior Court denied each petition as a matter of law.

Thereafter exceptions were taken to the Supreme Judicial Court of the Commonwealth, which exceptions were overruled in an opinion rendered by that court on April 1, 1952.

Material facts are also stated in the opinion of the Supreme Judicial Court of Massachusetts, which is hereinbefore set out in full in this brief.

Law and Argument.

The real essentials of due process under the Constitution of the United States are notice of the charge and an adequate opportunity to be heard in defense of it.

It is impressively apparent that the petitioner for certiorari in the proceedings now before this court was not with haste "rushed" to trial as was the situation in *Powell* v. *Alabama*, reported in 287 U.S. 45, and cited in the brief of the present petitioner.

In the *Powell* case several defendants were tried and convicted in the state court in Alabama on a most serious criminal charge, involving extreme penalty, without having the reasonable opportunity to obtain counsel to represent them at their trial. Obviously in the *Powell* case the defendants did not have the effective aid and assistance of counsel, a fundamental of due process, in the preparation of their case for trial nor as a matter of sound reason and law in the conduct of their trial.

In the *Powell* case Justice Sutherland, in delivering the opinion of the court, said in part:

> "In the light of the facts outlined . . . the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable

time and opportunity to secure counsel was a clear denial of due process. . . ."

Speaking further in the *Powell* case Justice Sutherland said in part:

> "All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. . . ."

Contrasting what was held to be denial of due process in *Powell* v. *Alabama*, 287 U.S. 45, with what took place in the case of the present petitioner in the Superior Court at Boston and with what is disclosed in the opinion of the Supreme Judicial Court for the Commonwealth, the present petitioner was denied no constitutional right under the Fourteenth Amendment or any other provision of the Constitution of the United States.

The following paragraphs numbered (1) to (6), inclusive, emphasize this view.

(1) The indictments against the petitioner, seven in number, for larceny, containing in all sixty-five counts, were returned into the Superior Court at Boston on July 8, 1949.

(2) On July 12, 1949, he was brought into the Superior Court and arraigned upon the indictments and at that time entered his plea of not guilty to each of the indict-

ments found by the Grand Jury against him. The court allowed him ten days for the filing of special pleas. He was then admitted to bail with surety.

(3) In May, 1950, the Department of Mental Health of the Commonwealth was notified by the Clerk of the Superior Court under the provisions of the General Laws of Massachusetts (Ter. Ed.) c. 123, § 100A, as amended. This gave the petitioner opportunity of an examination as to his mentality by impartial alienists selected by the Department of Mental Health. He was notified to appear for such examination. Although given the opportunity, he did not submit himself for such examination. He could not be compelled to do so against his will. It is conceded by the petitioner in his brief (page 5 thereof) that in May, 1950, he received notice from the Department of Mental Health to report for examination and that he did not so report.

(4) On June 5, 1950, the petitioner again appeared in the Superior Court before Mr. Justice Buttrick, and pleaded guilty to seven indictments for larceny, which contained in all sixty-five counts. He had been at that time examined by an alienist at the request of his then counsel on June 2, 1950 (R. 5). That examination was not at that time disclosed to the court by the petitioner or by his counsel.

(5) On October 9, 1950, he was sentenced to State Prison by the Chief Justice of the Superior Court upon two of the indictments, the remaining indictments being ordered placed on file by the court at the time of sentence, to which filing no objection was made.

(6) From July 8, 1949, when the indictments were returned into court, and July 12, 1949, when he was arraigned on the indictments and pleaded not guilty, until October 9, 1950, when he was sentenced by the Chief Justice of the Superior Court, there was a lapse of time of

approximately fifteen months. The petitioner was represented by experienced counsel. There was ample time for preparation during that period of time from indictment and arraignment in July, 1949, to sentence on October 9, 1950. There is no denial here of the effective aid and assistance of counsel. It is clearly apparent that adequate and most complete opportunity for effective defense, with the aid and assistance of competent counsel, was accorded this petitioner. From all that now appears the complete answer on the whole picture presented is that the petitioner, finding himself overwhelmed by the facts against him, elected not to stand trial but determined to plead guilty. It is again stressed that in all this process he was represented by able and efficient counsel. On June 5, 1950, he confessed to his crimes in open court by his pleas of guilty. At that time he had been examined by an alienist on May 25, 1950, and on June 2, 1950, at the instance of his then counsel. The report of the alienist on this examination was not disclosed to the court. Methods of handling criminal cases differ, even among admittedly competent and faithful members of the bar. One lawyer may in good faith take one course; another lawyer in good faith may take a different course. One course may bring desired results; another course may bring disaster. In the case of this petitioner before the Superior Court on June 5, 1950, the presentation to the presiding justice of the report of the psychiatrist in the hands of the defense might possibly have brought what could have been a measure of disaster. If the report had been presented to the court, the justice could have, *in the exercise of a sound discretion,* requested an examination of the petitioner by impartial psychiatrists selected by the Department of Mental Health, under the provisions of General Laws (Ter. Ed.) c. 123, § 100A. The results of the report of such impartial psychiatrists, under the statute, if such a

report had been made, would be accessible to the court, to the District Attorney and to the defense. However, whatever purpose it was that counsel for the petitioner had in mind the report of the psychiatrist engaged by the defense and in the possession of the defense was not at that time called to the attention of the court. If there was substantial merit in the report *as to criminal responsibility* (see *McGarty* v. *Commonwealth,* 326 Mass. 416 to 418), it would seem to be the natural course to exhibit the report of the psychiatrist to the court for such action as the court, in the performance of the judicial function, might take. On October 9, 1950, coming again into court after a further lapse of time, he was sentenced by the Chief Justice of that court for a series of substantial larcenies contained in two indictments out of seven found against him, which larcenies had been committed with apparent recurring consistency over an extended period of time (R. 7-13).

(7) The record of the Appellate Division of the Superior Court for the review of sentences to the State Prison in the case of *Commonwealth* v. *Samuel C. Brody* recites as follows:

> "November 30, 1950
>
> Brody brought before Appellate Division on Habeas Corpus from the State Prison.
>
> Hearing on Appeal.
>
> Order of Appellate Division
> Appeal dismissed
>
> "Justices present: Collins, Brogna, Sullivan.
> "Attorney for the Commonwealth, Frederick T Doyle Assistant District Attorney
> Attorney for Defendant, Herman Snyder, Esquire 73 Tremont Street Boston, Mass."

The foregoing record is attested, bearing the seal of the court, by William M. Prendible, Clerk of the Superior Court for Criminal Business, elected and qualified, and is further certified to, bearing the great seal of the Commonwealth, by Leo M. Harlow, Deputy Secretary of the Commonwealth.

> "The superior court shall consist of one chief justice and thirty-one associate justices."
>
> General Laws (Ter. Ed.) c. 212, § 1.

"The superior court," as those words are used in the statutes of Massachusetts, means the court held by one or more judges at a time and place established by law for the judicial administration of justice.

Commonwealth v. *Gedzium,* 261 Mass. 299, 301.

> "The court shall be held by one of the justices, and when so held shall have and exercise all the power and jurisdiction committed to said court. . . ."
>
> General Laws (Ter. Ed.) c. 212, § 2.

> "The court shall have original jurisdiction of all crimes . . ."
>
> General Laws (Ter. Ed.) c. 212, § 6.

> "The Superior Court is a court of original and general jurisdiction. It possesses the inherent powers of such a court under the common law, unless expressly limited, as well as those conferred by statute."
>
> *Commonwealth* v. *Kemp,* 254 Mass. 190, 192.
> *Commonwealth* v. *Parrotta,* 316 Mass. 307, 310.

The Appellate Division of the Superior Court is provided for in General Laws of Massachusetts (Ter. Ed.) c. 278, §§ 28A to 28D.

Section 28A provides as follows:

> "There shall be an appellate division of the superior court for the review of sentences to the state prison imposed by final judgments in criminal cases, except in any case in which a different sentence could not have been imposed, and for the review of sentences to the reformatory for women for terms of more than five years imposed by final judgments in such criminal cases. Said appellate division shall consist of three justices of the superior court to be designated from time to time by the chief justice of said court, and shall sit in Boston or at such other place as may be designated by the chief justice, and at such times as he shall determine. No justice shall sit or act on an appeal from a sentence imposed by him. Two justices shall constitute a quorum to decide all matters before the appellate division.
>
> "A designation by the chief justice of the members of the appellate division shall be recorded by the clerk for criminal business in Suffolk county who shall forthwith send copies thereof to the several clerks of the superior court."

> "The execution of the sentence belongs to the executive department of government. . . . Doubtless the court has power to enforce the execution of sentence by appropriate process, but execution of sentence is in its essence an executive or ministerial and not a judicial function.
>
> "After sentence has been pronounced three methods of relief alone are open to a defendant in a crimi-

nal case: (1) motion for new trial under the statute, *Commonwealth* v. *Rollins,* 242 Mass. 427, (2) writ of error, (3) appeal for clemency to the Governor. . . ."

Commonwealth v. *Dascalakis,* 246 Mass. 12, 20.

In the case of *Commonwealth* v. *Phelan,* reported in 271 Mass. 21, the Supreme Judicial Court of Massachusetts said in part:

"The rulings and the disposition of the motions were right. So far as the motions were in the nature of motions for a new trial, they were denied rightly because a motion for a new trial does not lie where there has been sentence on plea of guilty without trial. So far as these motions related to modification of sentence they could not be considered because manifestly not filed before the end of the sitting at which the sentence was imposed."

In the case of *Commonwealth* v. *Soderquest,* 183 Mass. 199, 201, an indictment, charging the crime of assault with intent to kill, was returned into the Superior Court on September 6, 1902. On September 16, 1902, the defendant was brought into court and pleaded guilty to the indictment. On September 29, 1902, he was sentenced to imprisonment in the State Prison. On November 13, 1902, he filed a motion for a new trial on the ground that he was not guilty of the crime as charged in the indictment, to which he had pleaded guilty, but that he was guilty of a lesser crime included in the major offense charged in the indictment, namely, a charge of simple assault. On January 7, 1903, the defendant filed a motion "asking the court to set aside or revoke the sentence, and that he be allowed to retract his plea of guilty and plead not guilty." On

January 9, 1903, after hearing in the Superior Court, the several motions were denied by the court upon the ground that under the law the court had no authority to grant them.

In that case Chief Justice Knowlton, speaking for the Supreme Judicial Court, said in part:

> "In both of these motions the defendant asked the court, after the expiration of the sitting at which the case was ended, and after the record presumably had been fully made up, and a long time after he had entered upon the execution of his sentence, to revoke the sentence and to take new proceedings in the case, as if it were still pending. It is well settled that, apart from special statutory authority, the court had no jurisdiction to grant the motions."

In concluding its opinion in that case, the Supreme Judicial Court said further:

> "We are of opinion that the power to grant a new trial at any time within a year after the original trial, which is conferred upon the Superior Court [by statute], does not authorize the court, in a case like the present, to revoke a sentence founded upon a plea of guilty. If the facts entitle the defendant to a remedy, it must be sought in another way."

It was decided in the case of *Commonwealth* v. *Phelan,* 271 Mass. 21, that in Massachusetts the writ of error *coram nobis* is obsolete. But see Massachusetts General Laws (Ter. Ed.) c. 250, § 9, which provides as follows:

> "A judgment in a criminal case may be re-examined and reversed or affirmed upon a writ of error for any error in law or in fact."

It is provided further in General Laws (Ter. Ed.) c. 250, § 11, in part, that a writ of error upon a judgment in any criminal case other than a capital case ". . . shall issue as of course, but it shall not stay or delay the execution of the judgment or sentence, unless by an express order of a justice of the supreme judicial court, who may make a further order for the custody of the plaintiff in error or for releasing him on bail."

> "A writ of error lies only to review proceedings according to the course of the common law. . . . Habeas corpus is the historic remedial process whenever it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States. . . . It cannot take the place of a writ of error in a case which was within the jurisdiction of the court, and where the only question raised is the correctness of the rulings of the court."
>
> *O'Leary, Petitioner,* 325 Mass. 179, 184.
> *McGarty* v. *Commonwealth,* 326 Mass. 413.

Illustrations of what states may do in criminal cases without running counter to the Fourteenth Amendment of the Constitution of the United States are set forth in the case of *Palko* v. *Connecticut,* 302 U.S. 319.

It was pointed out by the Supreme Court of the United States in *Snyder* v. *Massachusetts,* 291 U.S. 97, at page 105:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . . Its procedure does not run foul of the Fourteenth Amendment be-

> cause another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. . . . What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. . . ."

This principle has been reaffirmed by the Supreme Court of the United States as recently as *Bute* v. *Illinois*, 333 U.S. 640, where, at page 656, the court declared:

> "After exhaustive consideration of the subject, this Court has decided that the Fourteenth Amendment does not, through its due process clause or otherwise, have the effect of requiring the several states to conform the procedure of their state criminal trials to the precise procedure of the federal courts, even to the extent that the procedure of the federal courts is prescribed by the Federal Constitution or Bill of Rights. There is nothing in the Fourteenth Amendment specifically stating that the long recognized and then existing power of the states over the procedure of their own courts in criminal cases was to be prohibited or even limited."

The statute in Massachusetts relating to motions for a new trial is General Laws, c. 278, § 29, as most recently amended by St. 1939, c. 271, § 1, and reads in part as follows:

> "The Superior Court may, at the sitting in which a complaint or indictment is tried, or within one year thereafter, upon motion in writing of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or if it appears to the court that justice has not been or cannot be done, and upon such terms or conditions as the court shall order. . . ."

It was said by the Supreme Judicial Court of Massachusetts, Chief Justice Rugg speaking for the court, in the case of *Commonwealth* v. *Dascalakis*, 246 Mass. 12, at page 32:

> "But the presiding judge saw all the witnesses and heard them testify at the original trial and at the hearing on the motion for new trial. He is in far better position to determine the genuine merits of this newly discovered evidence than are the justices of this court who must depend upon the printed page. We should not be inclined to set aside his decision on this matter even if it seemed much less clearly right than it appears to us to be. Motions to set aside a verdict on this ground ordinarily rest in the sound judicial discretion of the trial judge. . . . It often has happened that confessedly newly discovered evidence has been held in criminal cases to be not of sufficient weight to be worthy of consideration in view of the overwhelming force of evidence for the Commonwealth."

It was said by the Supreme Judicial Court in a later case:

> "The granting of a motion for new trial is a matter of sound judicial discretion."

Fine v. *Commonwealth*, 312 Mass. 252, 258.

On June 5, 1950, the petitioner, represented by counsel, pleaded guilty to a number of larcenies of the grade of felony before Mr. Justice Buttrick of the Superior Court. Thereupon motion was made for sentence at that time by the prosecuting Assistant District Attorney. Under the law of Massachusetts, General Laws, c. 279, § 3A, such motion for sentence must be made within seven days of verdict of guilty or plea of guilty. The case was continued and on October 9, 1950, the petitioner again came into court, represented by counsel, appearing on that occasion before the

Chief Justice of the Superior Court. He was sentenced by the Chief Justice to the State Prison.

In imposing sentence the Chief Justice of the Superior Court had jurisdiction in the premises. The court of which the Chief Justice was a member had jurisdiction of the subject matter before him. All of the justices of the Superior Court were clothed with the same powers as to causes of action, criminal as well as civil. Each of the justices of the court had the absolute right to hear and determine all matters which remained undecided in the petitioner's case.

The Massachusetts statute relative to the investigation of the mental condition of certain persons held for trial is General Laws, c. 123, § 100A. That section reads as follows:

> "Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court or the trial justice, as the case may be, shall give notice to the department, which shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. Whenever the probation officer of such court has in his possession or whenever the inquiry which he is required to make by section eighty-five of chapter two hundred and seventy-six discloses facts which if known to the clerk would require notice as aforesaid, such probation officer shall forthwith communicate the same to the clerk who shall thereupon give such notice unless already given. The department shall file a report of its investigation with the clerk of the court in which the

trial is to be held, and the report shall be accessible to the court, the probation officer thereof, the district attorney and to the attorney for the accused. In the event of failure by the clerk of a district court or the trial justice to give notice to the department as aforesaid, the same shall be given by the clerk of the superior court after entry of the case in said court. Upon giving the notice required by this section the clerk of a court or the trial justice shall so certify on the papers. The physician making such examination shall, upon certification by the department, receive the same fees and traveling expenses as provided in section seventy-three for the examination of persons committed to institutions and such fees and expenses shall be paid in the same manner as provided in section seventy-four for the payment of commitment expenses. Any clerk of court or trial justice who wilfully neglects to perform any duty imposed upon him by this section shall be punished by a fine of not more than fifty dollars."

Even if there were in any respect in administrative channels a measure of non-compliance with the provisions of section 100A of chapter 123 of the General Laws of the Commonwealth, such non-compliance, if any, did not, as a matter of law, invalidate the sentence imposed upon the petitioner in the Superior Court by its Chief Justice. The petitioner by notice had been given the opportunity to submit himself to impartial alienists for such examination and did not avail himself of that opportunity.

> "While the defendant was not required to submit to a mental examination his refusal did not prevent the Commonwealth from putting him on trial."
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> *Commonwealth* v. *Brody,* 1952 Mass. Adv. Sh. 361, 363.

Commonwealth v. *Gray*, 314 Mass. 96, 104-105.
Commonwealth v. *Vallarelli*, 273 Mass. 240, 249.
Commonwealth v. *Belenski*, 276 Mass. 35, 45.

As to the two petitions, identical in form and substance, which were filed by the petitioner through present counsel on September 21, 1951, to vacate sentences, withdraw pleas of guilty and obtain trial on the merits, which petitions were denied by the Chief Justice of the Superior Court on September 26, 1951, long after sentence had been imposed, the petitions and the subject matters thereof were not within the jurisdiction of the Superior Court. The Chief Justice of the Superior Court rightly denied both of these petitions as a matter of law.

Commonwealth v. *Phelan*, 271 Mass. 21.
Commonwealth v. *Soderquest*, 183 Mass. 199.
Commonwealth v. *Dascalakis*, 246 Mass. 12, 20.
Fine v. *Commonwealth*, 312 Mass. 252, 256-257.

"The authority of this judge to impose sentence cannot be doubted."

Commonwealth v. *Brody*, 1952 Mass. Adv. Sh. 361, 363.

See *Commonwealth* v. *Gedzium*, 261 Mass. 299; and *Peterson* v. *Hopson*, 306 Mass. 597, 603.

It was further said in part by the Supreme Court of the United States in *Snyder* v. *Massachusetts*, 291 U.S. 97, at page 122, Mr. Justice Cardozo speaking for the court:

"The constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in

law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (*Otis* v. *Parker*, 187 U.S. 606, 609), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

Conclusion.

Upon all of the foregoing it is respectfully submitted that the petition for writ of certiorari in these proceedings should be denied.

Respectfully submitted,

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